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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

~~No. A-54~~

NEWARK TEACHERS UNION, etc., *et al.*,
Petitioners,

vs.

THE BOARD OF EDUCATION OF NEWARK, etc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Your petitioners, a local union and 186 individuals (including 183 members of the union, one non-member teacher, one retired teacher and one local college instructor) who have each been sentenced to jail for periods ranging from 10 days to three months in addition to fines, respectfully pray that a writ of certiorari issue to review the judgments and opinions of the New Jersey

Superior Court, Appellate Division, entered in this proceeding on April 5, 1971.

Opinions Below

The Supreme Court of New Jersey acted in this matter on J ly 7, 1971 denying a review from two decisions of the Appellate Division of the Superior Court of New Jersey which were rendered on April 5, 1971 (copies attached as Appendicies A and B). (Only one opinion is reported, 114 N. J. Super. 306.) Those decisions (consolidated for purposes of thi- proceeding) affirmed convictions of contempt against each of the petitioners and directed that jail sentences be served commencing as of July 12, 1971. The New Jersey Supreme Court, however, by its order of July 7, 1971 (copy attached as Appendix C) stayed the execution of those jail sentences until August 2, 1971 so as to permit this Court to pass upon an application for a stay pending the filing of the petition for a writ of certiorari. On July 23, 1971, Mr. Justice Brennan stayed execution of the judgments and mandates of the Appellate Division (copy of order attached as Appendix D). Such order, requiring timely filing of this petition, stays the judgments and mandates until the Court either decides to deny the petition, or, if the writ is granted, until a determination of the merits of the full case.

Jurisdiction

The judgments of the New Jersey Superior Court, Appellate Division, were entered on April 5, 1971, affirming petitioner's convictions in summary criminal contempt proceedings conducted by the Chancery Division of the New Jersey Superior Court. A timely petition for cer-

tification to the New Jersey Supreme Court was filed. Such petition was denied on July 7, 1971. This petition for certiorari was filed within 90 days of that date, and on or before the date required by the above-referenced order of Mr. Justice Brennan. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(3).

Questions Presented

I. Whether the broad and absolute common law rule of New Jersey, under which its courts issue injunctions restraining "striking", picketing and non-picketing forms of supportive communication relating to public employee "strikes", without regard to a) essentiality of the services, b) details of the particular conflicts, including questions with respect to the arbitrariness or lack of good faith of the public officials involved, and c) with the broadest prohibition of any communication supportive of the group action, violates this Court's requirements of precision and narrowness of regulation in the First Amendment area.

II. Whether the jailing of rank and file members of the union for nonviolent concerted acts of the union violates constitutional rights of association and is a regulation of First Amendment conduct far more drastic than the state's regulatory interest justifies.

III. Whether the restraint *sub judice,* which prohibited a vast range of activity (including such acts as "indirectly" "sanctioning" an "impediment to work"), abridges First Amendment rights, being overbroad and vague, both in its language and its impact.

IV. Whether the Chancery Division lacked jurisdiction to issue the restraining order, operating as it does in the

First Amendment area, because no effort was made to give notice of impending issuance to defendants, thus denying due process of law as required by the Fourteenth Amendment.

V. Whether the New Jersey law and process here at issue violate the due process clause of the Fourteenth Amendment by failing to provide adequate procedural safeguards in the prosecution of conduct declared "illegal" pursuant to New Jersey's common law prohibition against public employee strikes and concerted activity, including failure to afford any possibility of defense even by persons not parties to the injunction proceeding.

VI. Whether the Appellate Division's application to this case of this Court's opinion in *Walker* v. *City of Birmingham* as to persons not named in the injunction proceedings was misconceived, thus denying petitioners due process of law as per the Fourteenth Amendment.

Constitutional Provisions Involved

Petitioners rely on the First and Fourteenth Amendments to the United States Constitution.

Statement of the Case

The contempt proceedings here at issue grew out of the 1970 labor dispute between the defendant union and the Board of Education of Newark. An existing collective bargaining contract was expiring as of January 31, 1970 and the parties had been in negotiations concerning a renewal thereof. An *ex parte* injunction was drafted by the Board and issued, without modification, as an order of the Chancery Division by Judge Herbert on January

31. It appeared a strike was being considered by the union at a meeting the following day, to commence on February 2.

No notice, formal or otherwise, was given any defendant prior to the decree of the court, notwithstanding the provisions of New Jersey Rule 4:52-1(a) and notwithstanding the Board of Education had been informed at least from and after January 16 that the union wanted to strike if there was no settlement by January 31. The injunction, designed to restrain a spectrum of concerted activity by the union, 11 named officers (the only persons named as defendants), and unnamed and indeterminate individuals, is as follows:

> ORDERED, that the defendants, Newark Teachers Union, Local 481, American Federation of Teachers, A.F.L.-C.I.O., an unincorporated association, and the defendant New Jersey State Federation of Teachers, an unincorporated association, their respective members, officers, directors, committee members, employees, agents and representatives, Carol Graves, Frank Fiorito, Donald Nicholas, Bernie Nisenholz, John Palmieri, Betty Rufalo, Durecia Watley, Edward Gadson, Frank Volpe, William Puzak and Edward Tumin, individually and as officers of the Newark Teachers Union, Local 481, American Federation of Teachers, A.F.L.-C.I.O., and their respective agents and representatives, and all persons acting in behalf of or in concert or participation with the said defendants or the said members, officers, directors, committees, employees, agents and representatives, or any of them, are hereby restrained and enjoined from, directly or indirectly, or by any manner or means:

1. Causing, instigating, promoting, encouraging, sanctioning, authorizing, carrying on, participating in, fostering, continuing, lending support or assistance to or aiding or abetting any strike, sitdown, slowdown, work stoppage or other impediment to work, against the plaintiff or by any employee or employees of the plaintiff;

2. Picketing, congregating, parading, patrolling, loitering, gathering, or walking back and forth,—or causing, instigating, promoting, encouraging, sanctioning, intimidating, coercing, counselling or authorizing any person or persons to picket, congregate, parade, patrol, loiter or walk back and forth,—in front or in the vicinity of the public schools, buildings, grounds, playgrounds, yards, or premises of the plaintiff or operated or administered by the plaintiff, or in front of any buildings, grounds, playgrounds and premises on or at which any instructional or guidance program is conducted by plaintiff;

3. Interfering with, obstructing, impeding, or delaying, or attempting to interfere with, obstruct, impede or delay the plaintiff in the performance of any of its duties and functions or in the conduct of the Newark public school program; or interfering with, obstructing, impeding, intimidating, coercing or harassing, or attempting to interfere with, obstruct, impede, intimidate, coerce or harass, any person, firm or corporation in the performance of any duty, obligation, function, service or act for the plaintiff or in the fulfillment or performance of any commitment to or contract with the plaintiff relating to plaintiff's duties and func-

tions or to the conduct of the Newark public school program;

4. Doing or attempting to do any act to interfere with, obstruct, impede or delay, or tending to interfere with, obstruct, impede or delay deliveries of any goods, wares, merchandise, supplies, food, beverages, fuel, equipment or appartus to and for the plaintiff, or to and for any place at which plaintiff conducts a program or activity as part of the Newark public school program;

5. Doing or attempting to do or causing, instigating, encouraging, intimidating, coercing or counselling or attempting to cause, instigate, encourage, intimidate, coerce or counsel any person, firm or corporation to do any act to interfere with, obstruct, impede or delay, or tending to interfere with, obstruct, impede or delay any maintenance work, alterations, or repairs on or at any public schools, buildings, grounds, playgrounds, yards and premises of the plaintiff, or on or at any buildings, grounds, playgrounds, or premises where any instructional or guidance program is conducted by plaintiff;

6. Doing or attempting to do, or causing, instigating, encouraging, intimidating, coercing or counselling, or attempting to cause, instigate, encourage, intimidate, coerce or persuade any firm or corporation to do any act to interfere with, obstruct, impede or delay, or tending to interfere with, obstruct, impede or delay the construction of any building or addition to any building or any premises of the plaintiff;

> 7. Agreeing, conspiring, or combining to do any of the foregoing acts, or directly or indirectly accepting, arranging for, or soliciting from any source funds or other support for the doing of any of the foregoing acts mentioned in paragraphs "1" to "6", directly preceding the within paragraph "7."

On February 2 there was a strike by the defendant union pursuant to direction from its constituency. It is clear that the strike involved no violence or threat thereof, mass picketing or any coercive action whatsoever. Certain efforts were undertaken to make personal service on those named in the injunction but no service was made on any other persons. The injunction was posted on various bulletin boards and reprinted in newspapers. Beginning on February 4, the Board of Education initiated contempt proceedings, charging violation of the injunction. On that day and the following day, arrest orders were issued for six of the union leaders.

On February 6, the Chancery Division ordered the Essex County Prosecutor to investigate the strike. Thereafter, on February 10, the Chancery Division ordered the Essex County Sheriff to arrest those who violated the injunction. Arrests followed on February 11, 13, 17, 18, 19 and 20. These mass arrests were made at or near picketlines, many persons being arrested with warrants issued in blank. Non-teachers as well as teachers were arrested. Civil rights leader Bayard Rustin was charged with contempt as a result of addressing a union rally in Newark on February 8. Other union leaders (non-teachers) who picketed or spoke out in support of the strike were charged with contempt. One Mrs. Alice Saltman, a *retired* teacher, was arrested *and* convicted for

appearing near a school and picketing. One Miss Joan Stevens, a non-union striking teacher, was likewise arrested and convicted. One Mr. Jerry Meyer, an instructor at a local college and not a striker or union member, was also arrested and convicted. Almost 3,000 of the approximately 4,000 teachers in the Newark system supported the strike and did not work throughout its four-week duration (Tr., Mar. 16, 1970, 34-35). Other than the six officers prosecuted, the basis upon which the 186 individuals were selected for prosecution from among the 3,000 strikers appears to have been that they were at one point identified either "picketing or assembling and congregating outside the schools" (opinion of Appellate Division, NTU case, 4a).

Summary criminal contempt proceedings were conducted, with most trials involving stipulations. The union and 186 individuals were convicted. The latter now face, in the main, 10-day jail sentences. There were fines for all, ranging from a minimum of $200 to a fine of $40,000 for the union. Greater penalties were leveled at six union officers, some of whom have been sentenced to as much as three months in jail and fines of $500.

The sole proof in support of conviction was that the defendants had not worked (which was also true of some 3,000 others) and had engaged in picketing or congregating near schools.

Since the court granted the injunction *ex parte*, no consideration was then given to the issues in or causes of the strike. New Jersey law absolutely precludes consideration of "good motive" and circumstances either at the time of the application for an injunction of a public employee strike or upon the issue of contempt for violation thereof. *Board of Education, Borough of Union Beach* v.

NJEA, et al., 53 N. J. 29, 37, 40-41, 42 (1968). Nor did the court consider whether it might have drawn its injunction more narrowly. At the trial of the contempts, introduction of evidence bearing upon the conduct of each individual in relation to the issues in the strike was foreclosed by the court (*e.g.*, Tr., Feb. 16, 1970, 22). See also Tr., Feb. 24, 118.

How Federal Questions Were Presented

The federal questions herein presented were presented below. The Appellate Division review *sub judice* was *de novo*, pursuant to N.J.S.A. 2A:10-3 and R. 2:10-4. Hence, all issues were available in that court, whether raised in the Chancery Division or not. See *NTU* opinion at 12a and *Joan Stevens* opinion at 15a-16a.

At the trial level (Chancery Division of the New Jersey Superior Court) the three judges who presided over the several summary criminal contempt proceedings narrowed the scope of inquiry to "simply did the various defendants have notice of the order and, number two, did any of them violate the order." Tr., Feb. 16, 22. Thus, when testimony was sought relative to the good faith of the public employer, the typical reply of the trial court was "[i]t is not germane at all." Tr., Feb. 24, 118. See also, Tr., Feb. 18, 194. And when testimony was offered in mitigation to show the circumstances surrounding the contemptuous acts, the court replied, "It is not for this Court to evaluate the frustrations of the teachers. . . . I'm not concerned whether their cause is just or unjust." Tr., Feb. 24, 194; see also Tr., Feb. 24, 190-94; Tr., March 3, 337-45.

The foregoing reflects that neither the Chancery Division nor the Appellate Division of the Superior Court

could overturn the law as developed by the New Jersey Supreme Court, and the New Jersey Supreme Court's refusal to hear this case indicates that court's inalterable commitment to the absolute ban. Thus, the Appellate Division found that "[a] restraint against *an unlawful strike* and picketing in furtherance thereof was constitutionally permissible." (*Joan Stevens* opinion at 16a) (emphasis supplied). See also, Tr., Feb. 18, 37-39, 193.

The question of the propriety of jailing nonviolent rank and file strikers was argued at the trial level throughout the hearings, when sentences were about to be imposed. See, *e.g.*, Tr., Feb. 24, 190-92, 202; Tr., March 3, 342-45. Briefs to the Appellate Division by appellants in both of the cases here consolidated challenged the jail sentences (*NTU brief,* Point IV; *Joan Stevens* brief, Point V). The Appellate Division, in each instance, specifically rejected the argument (*NTU* opinion, 12a-13a; *Joan Stevens* opinion, 17a).

Questions of overbreadth and vagueness of the injunction were raised before the Appellate Division, and decided. First, in the *NTU* brief (Point II) it was asserted that certain named individuals were convicted of an act with which they had not been charged. In rebutting this allegation, the Appellate Division interpreted *all* supposedly illegal conduct "as part of a strike movement on the part of Local Union 481" or as indicating that defendants "aided and abetted in a strike." *NTU* opinion, 7a. The *Joan Stevens* brief (Points II and III) specifically raised the questions of overbreadth and vagueness of the injunction—allegations which were addressed and summarily dismissed in the Appellate Division opinion at 16a. See also, e.g., Tr., March 4, 272-73.

The absence of procedural safeguards was argued at the trial level, and briefed and decided above. See, *e.g.*,

NTU opinion at 5a (manner of arrest), at 6a-7a (proofs), and at 11a (notice of offense); *Joan Stevens* opinion at 15a-16a (notice of issuance of restraint), and at 16a-17a (procedural defects on face of injunction and manner of arrest); *NTU* brief, Points I and III; *Joan Stevens* brief, Points II, III and IV; see also, *e.g.*, Tr., Apr. 10, 7-10; Tr., Feb. 24, 202, 217; Tr., Feb. 18, 197-99; Tr., March 11, 32-34; Tr., March 9, 12; Tr., March 3, 261, 268.

The inapplicability of *Walker* v. *Birmingham* to these proceedings was argued in the *Joan Stevens* brief at Point IV, and decided adversely to appellant (*Joan Stevens* opinion at 16a).

The issue of failure to give notice of the issuance of the *ex parte* restraining order was inherent in Point II of the *Joan Stevens* brief, where it was argued that "Joan Stevens was not a party to the original proceeding in which the Restraining Order was issued" (at p. 17). Such defect was apparently focused on by the Appellate Division, and disregarded (*Joan Stevens* opinion at 15a).

The consolidated petition for certification to the New Jersey Supreme Court raised all the questions here presented.

REASONS FOR GRANTING THIS WRIT

I.

The decisions below, involving the mass jailing of rank and file members of a union for peaceful conduct, present a significant matter of first impression for this Court, having broad impact upon First Amendment rights of association, both in the public employee union context and beyond.

Petitioners believe that this is the first occasion where there has been presented to this Court the constitutional questions involved in the mass jailing of rank and file members of a union and their supporters for peaceful conduct, claimed to be in violation of an *ex parte* injunction of remarkably broad and speech-interdicting scope and issued in a proceeding in which they were not even parties. The issues arise in the context of a continuing debate over public employee strikes, a question which has challenged scholars,[1] government commissions,[2] and the

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[1] Burton and Krider, "The Role and Consequences of Strikes by Public Employees," 79 Yale L.J. 418 (1970); Wellington and Winter, "The Limits of Collective Bargaining in Public Employment," 78 Yale L. J. 1107 (1969); Wellington and Winter, "Structuring Collective Bargaining in Public Employment," 79 Yale L.J. 805 (1970); Kheel, "Strikes and Public Employment," 67 Mich. L. Rev. 931 (1969); Staudohar, "The Changing Role of the Injunction in Public Sector," Labor Law Journal 287 (May 1971).

[2] See Smith, "State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis," 67 Mich. L. Rev. 891 (1969).

courts.[3] In this debate, as will be shown, New Jersey has staked out an extreme position in which elementary constitutional principles have been sacrificed to an absolutist formulation limiting the rights of public employees, which will have impact not only on public employee unions but as well on other unions and, ultimately, in all areas of association.

Petitioners are aware that in a number of cases presented to this Court, petitions for writs of certiorari have been denied in cases involving contempt citations arising out of public employee strikes. Examination of each of those cases, however, makes clear that they involve convictions or fines against *union leaders* who were *named defendants*.[4] The decisions in those cases are ac-

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[3] Aside from the New Jersey cases cited in the Appellate Division decisions herein, note should be made of some of the following recent decisions: *School District for the City of Holland, Ottawa and Allegan Counties, Michigan* v. *Holland Education Association,* 380 Mich. 314, 157 N.W. 2d 206 (1968); *In re Berry,* 65 Cal. Rptr. 273 (1968); *Crestwood School District* v. *Crestwood Education Association.* 170 N.W. 2d 840 (1969); *City of New York* v. *DeLury,* 23 N.Y. 2d 175, 243 N.E. 2d 128 (1968), appeal dismissed, 394 U.S. 455 (1969); and see other lower court decisions referred to in Staudohar, *supra,* n. 1.

[4] *Cook County College Teachers Union* v. *Swenson,* 262 N.E. 2d 125 (Ill. App. Ct., 1970), cert. den., 39 U.S.L.W. 3518 (5/25/71); *Dade County Classroom Teachers Assn.* v. *Rubin,* 238 So. 2d 284 (Fla. S.Ct., 1970) (see also 217 So. 2d 293), cert. den., U.S. , 91 S. Ct. 569 (1971); *Anderson Federation of Teachers* v. *School City of Anderson,* 251 N.E. 2d 15 (Ind. S.Ct., 1969), reh. den., 254 N.E. 2d 324 (Ind. S.Ct., 1970), cert. den. 399 U.S. 928 (1970); *Shanker* v. *Rankin,* 25 N.Y. 2d 780 (1969) (see also, 295 N.Y.S. 2d 625), appeal dismissed, 396 U.S. 120 (1969); *City*

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cordingly well within the ambit of this Court's decision in *United States* v. *United Mine Workers,* 330 U. S. 258 (1947). But not since the days of the *Danbury Hatters* case (*Loewe* v. *Lawlor,* 208 U. S. 274 (1908)) has any court in this land adopted the technique of penalizing individual rank and file members of a union for their concerted peaceful activity as members of a union.

The *Hatters* case involved only a financial penalty against the individual members. Here the penalty is the most extreme form of deprivation of liberty: jailing. Aside from the fact that such a remedy "shocks the conscience",[5] it is clear that the course chosen by the New Jersey courts, as expounded in a series of cases culminating in this one, ignores major constitutional rights both of a procedural and a substantive nature.

This Court has shown acute awareness of the implications of penalizing rank and file members of a union for actions of the union itself. See *Atkinson* v. *Sinclair Refining Co.,* 370 U. S. 238 (1962), where the Court refused

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of New York v. *DeLury,* 23 N.Y. 2d 175 (1968), appeal dismissed, 394 U.S. 455 (1969), reh, den., 396 U.S. 872 (1969); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook R.R. Co.,* 380 F. 2d 570 (D.C. Cir., 1967), cert. den., 389 U.S. 327 (1967); *City of Detroit* v. *Div. 26 of Amalgamated Assn.,* 332 Mich. 237, 51 N.W. 2d 228 (1952), appeal dismissed, 344 U.S. 805, reh. den. 344 U.S. 882 (1952).

[5] Even those who advocate the need for developing a different set of rules for public employees' strikes than for the private sector emphasize the need to avoid sanctions "so harsh as to engender a feeling of revulsion in the community," Wellington and Winter, *supra,* n. 1, 79 Yale L.J. 805, 839 (1970).

to permit even union committeemen to be sued in damages for breach of a collective bargaining contract, insisting that the remedy was against the union. While of course the decision was based upon statute, the statute itself was based upon a recognition of the development of the institutional role of unions. See *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 403 (1947). And the Court took occasion to refer to the "deeply felt congressional reaction against the *Danbury Hatters* case (*Loewe* v. *Lawlor,* 208 U. S. 274; *Lawlor* v. *Loewe,* 235 U. S. 522) and an expression of legislative determination that the aftermath (*Loewe* v. *Savings Bank of Danbury,* 236 F. 444 (C. A. 2)) of that decision was not to be permitted to recur." 370 U. S. at 248.

The chilling impact of the invocation of penalties against rank and file members of a union as applied in this particular case has far reaching consequences upon associational freedoms in all areas. Historically the "enjoining 'whomsoever' from engaging in 'whatsoever' totally paralyzed the union from any concerted action." Summers and Wellington, *Cases and Materials on Labor Law,* Mineola, New York, The Foundation Press, 1968, p. 187. That paralysis—or chill—will now be felt in all unions (and beyond) and thus poses an unconstitutional threat to rights of association. There is no "breathing space" for First Amendment freedoms in this scheme of jailing individuals for peaceful support of their union. *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). Thus, even if a state may, consistent with the Constitution, prohibit public employee strikes, it has no power to fashion remedies which will effectively stop public employee unionism. New Jersey has clearly selected a penalty of jailing 186 rank and filers although it "has within its power

'less drastic' means of achieving [its] objective." *Aptheker* v. *Secretary of State,* 378 U. S. 500, 512-13 (1964).[6]

New Jersey is not the only state facing burgeoning public employee unionism and public employee strikes. But nobody—literally no authority and no court—has reacted as has New Jersey to structure the massive jailing of rank and file members, for it is obvious that this type of retreat to the *Cordwainers* case and its New Jersey counterpart, *State* v. *Donaldson,* 32 N. J. L. 151 (Sup. Ct., 1867), is a retreat not just from public employee strikes but from constitutionally protected public employee unionism. Cases commonly cited for the proposition that public employee strikes are illegal, do not involve the jailing of rank and filers for peaceful conduct.[7]

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[6] The question of "appropriate sanctions for violations of the no-strike policy" has been the subject of detailed consideration by governmental commissions in Connecticut, Minnesota, Rhode Island, New York, Michigan, Illinois, New Jersey, Pennsylvania, and Los Angeles. Analysis of all these reports establishes that—

"There was substantial accord that punitive sanctions directed at individual employees such as those embodied in New York's now-defunct Condon-Wadlin Law, or Michigan's former Hutchinson Act, are unworkable in any major strike situation." Smith, *supra,* n. 2, 67 Mich. L. Rev. at 911.

[7] Your petitioners have argued this proposition before. The Prosecutor has cited certain cases, presumably as precedent for the New Jersey approach. No case cited by the Prosecutor stands for the proposition that rank and file nonviolent strikers should be imprisoned. The following citations, with introductory page references to the Prosecutor's initial usage of them in his Brief in Opposition to Petitioners' Application for a Stay of Execution of Sentence, are offered:

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Independent of the more specific constitutional issues discussed below, your petitioners submit that the question of jailing 186 members of a union for their peaceful conduct as members of their union of itself merits review by this Court, in light of inevitable impact on employee rights and associational rights in all areas.

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Page 12: *New Jersey Turnpike Authority* v. *American Federation of State, County & Municipal Employees*, 83 N.J. Super. 289, 200 A. 2d 134 (Ch. Div., 1964) (declaratory judgment and injunctive relief sought to prevent Turnpike employees from striking; no criminal sanctions imposed); *Donevero* v. *Jersey City Incinerator Authority*, 75 N.J. Super. 217, 182 A. 2d 596 (Law Div., 1962), rev'd *sub nom. McAleer* v. *Jersey City Incinerator Authority*, 79 N.J. Super. 142, 190 A. 2d 891 (App. Div., 1963) (municipal employees struck and municipality refused to reinstate them; held, no just cause for dismissal shown; no criminal sanctions); *Norfolk Teachers' Assn.* v. *Board of Education*, 138 Conn. 269, 83 A. 2d 482 (1951) (declaratory judgment suit; held that public school teachers are not permitted to strike and that arbitration would be a proper way of solving disputes); *City of Los Angeles* v. *Los Angeles Bldg. & Central Trades Council*, 94 Cal. App. 2d 36, 210 p. 2d 305 (D.C. App., 1952), reaffirmed 109 Cal. App. 2d 81, 240 P. 2d 16 (D.C. App., 1952) (injunction against strike of governmental employees affirmed; not criminal action); *City of Manchester* v. *Manchester Teachers Guild*, 100 N.H. 507, 131 A. 2d 59 (1957) (injunction against striking teachers held to have been validly issued; no criminal penalties imposed); *City of Alcoa* v. *Int'l Brotherhood of Electrical Workers*, 203 Tenn. 12, 308 S.W. 2d 476 (1957) (injunction issued against striking city electrical employees held to have been valid; no criminal penalties involved); *City of Pawtucket* v. *Pawtucket Teachers' Alliance*, 87 R.I. 364, 141 A. 2d 624 (1958) (bill in equity to enjoin teachers from striking held properly issued; not criminal action); *Port of Seattle* v. *Int'l. Longshoremen's & W. U.*, 52 Wash. 2d 317, 324 P. 2d 1099 (1958) (injunction properly issued to restrain union and members from striking; no criminal penalties).

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II.

The decisions below present in sharp focus the question of the application of well-defined principles of constitutional law—those requiring precision and narrowness of regulation in the First Amendment area—to State efforts to regulate and control public employee union activity.

Beyond the unprecedented nature of the penalty, the overriding constitutional dilemma which this case brings into sharp focus is how state regulation of public em-

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Pages 20-21: *In re Buehrer,* 50 N.J. 501, 312-13 (1967) (fines, suspended sentences and probation); *In re Block,* 50 N.J. 494, 499 (1967) (officers sentenced); *Whippany Paperboard Co., Inc.* v. *Local 301,* 11 N.J. 153 (1952) (violence and threats of violence).

The following additional citations, with introductory page references to the Prosecutor's initial usage of them in his Brief in Opposition to Petition for Certification in the Supreme Court of New Jersey, are offered:

Page 20: *United States* v. *Brotherhood of Railroad Trainmen,* 95 F. Supp. 1019, 1020 (D.D.C., 1951) (fine imposed on union); *Harrison* v. *Terry Dairy Products Co.,* 287 S.W. 2d 473 (S. Ct. Ark., 1956) (suspended sentence); *Jones* v. *Lewis,* 35 N.W. 2d 891 (S. Ct. Iowa, 1949) (specific finding of violence); *Local 890, Int'l. Union of Mine, Mill & Smelter Workers* v. *New Jersey Zinc Co.,* 272 P. 2d 322 (S. Ct. N. Mex., 1954) (initially suspended sentences, which were ultimately revoked as to six named defendants who appear to be union leaders; see *Jencks* v. *Goforth,* 261 P. 2d 655); Fawick *Airfley Co.* v. *United Electrical, Radio & Machine Workers Local* 735, 92 N.E. 2d 436 (Ct. of App. Ohio, 1956 (evidence of violence).

ployee concerted activity is to be squared or balanced with certain well-defined constitutional principles which this Court has developed in the context of other associational activities. We submit that the starting point of discussion must be that state regulatory action in areas touching upon First Amendment activity must be demonstrably necessary, precise, not overbroad, and must comport with fundamental principles of due process.[8] "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 448 (1963). Peaceful associational activity and peaceful communicational picketing is certainly within the area where "precision" is the "touchstone".

New Jersey, however, as evidenced by this case, has staked out a position in which it considers itself effectively freed of all constitutional restraint in dealing with

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[8] The cases where the Court has developed these concepts most clearly have emerged in the main from the pressure of organizational groupings seeking to correct racial injustices. *e.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963) *supra; Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960). But the source of constitutional principles is the same whether operating in the field of civil rights or in the area of labor relations. See *Brotherhood of Railway Trainmen* v. *Virginia*, 377 U.S. 1 (1964), *and United Transportation Union* v. *State Bar of Michigan*, 28 L.Ed. 2d. 339 (April 5, 1971); and see opinion of Warren, C.J., in *Walker* v. *Birmingham*, 388 U.S. 307, 330 (1967). Concern for the organization of working people was, after all, the prevailing context in which this Court first fashioned fundamental principles of associational rights and the rights of expression. See *Hague* v. *CIO*, 307 U.S. 496 (1939); *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

the regulation of group activity and strikes of public employees. (And, as is indicated in Point III, *infra,* the issue of the application of constitutional principles to public employee unionism is one of pressing national importance.)

New Jersey's position is, as stated earlier, one developed through common law and not by legislation. The New Jersey cases speak in absolutes in terms of the kind of public employees the strike ban encompasses. See, *e.g., Delaware River and Bay Authority* v. *International Organization etc.,* 45 N. J. 138, 146 (1965) (operators of ferry service); *N. J. Turnpike Authority* v. *American etc. Employees,* 83 N. J. Super. 389, 395 (Ch. Div., 1964) (toll collectors and maintenance employees of N. J. Turnpike Authority); *Donevero* v. *Jersey City Incinerator Authority,* 75 N. J. Super. 217, 222 (Law Div., 1962), reversed on other grounds, 79 N. J. Super. 142 (App. Div., 1963) (public incinerator employees). "When government undertakes itself to meet a need, it necessarily decides the public interest requires the service, and its employees cannot reverse or frustrate that decision by a concerted refusal to meet that need." *In re William Block,* 50 N. J. 494, 499 (1967).[9]

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[9] New Jersey has no answer to the following questions posed by Chief Justice DeBruler in his dissenting opinion in *Anderson Federation of Teachers* v. *School City of Anderson,* 251 N.E. 2d 15, 21 (Ind. Sup. Ct., 1970):

"Does the majority seriously believe that a strike by employees of municipal golf courses would result in anarchy? What of city parking lot attendants? What about janitors? What about referees at the high school football games?"

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A wide range of group activity involving concerted employee efforts is deemed to be a "strike" or, if not a strike, nevertheless prohibited. Thus, in *Board of Education, Borough of Union Beach* v. *NJEA, et al.*, 53 N. J. 25 (1968), the court enjoined collective resignation from employment plus the notification by the parent body to its members that the local had unacceptable working conditions and that members would be "sanctioned" if they accepted employment there. See 53 N. J. at 41, n. 2, par. (2). To the argument that the conduct did not amount to a strike, the New Jersey court responded:

> "The public demand for services which makes illegal a strike against government inveighs against any other concerted action designed to deny government the necessary manpower, whether by terminating existing employment in any mode or by obstructing access to the labor market." 53 N. J. at 37.

And, to leave no doubt as to the scope of conduct to be included within the sweep of its prohibition, the court continues:

> "So our criminal statute, N.J.S. 2A:98-1, provides in simple but pervasive terms that any two or more persons who conspired 'to commit any act' for

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The majority opinion in the Indiana court also ignored these questions of its Chief Justice. But Indiana has not yet in application extended a prohibition of public employee strikes to any and all public employees. New Jersey has done exactly that, as we show in the text. Moreover, the Indiana case did not involve contempt proceedings against rank and filers; it was the union as such that was proceeded against there.

> the obstruction of . . . the due administration of the laws' are guilty of a misdemeanor." 53 N. J. at 38.

Shades of the Philadelphia *Cordwainers* case!

It matters not what issues may have brought about the strike—how arbitrary or capricious the person or body exercising governmental power may have been or how meritorious and defensible was the action of the employees. Indeed, the New Jersey court has emphasized that any attempt to defend upon those grounds is but further proof of the guilt of parties charged with violation of the injunction. *In re William Brown, Jr.,* 50 N. J. 435, 437 (1967), presented a striking teacher's argument that he disfavored the strike but went along so as to maintain his position on the negotiating team and thus be able to influence return to work. The court said:

> "But the facts, indeed defendant's own testimony, show his violation of the order was willful. The real thrust of his appeal is that his motive was good. Good motive, of course, does not negate willfulness." 50 N. J. at 437.

Nor does New Jersey require the public employer to submit any proof to support its claim of irreparable injury. How different the New Jersey rule is from that of Michigan, which recognized the constitutional problem presented.

> "We here hold it is insufficient merely to show that a concert of prohibited action by public employees has taken place and that *ipso facto* such a showing justifies injunctive relief. We so hold because it is basically contrary to public policy in this State to

> issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace. . . . We further so hold because such an interpretation of the act would as before noted raise a serious constitutional question.
>
> "'We indicated earlier that we deal with a meager record. No testimony was taken on the hearing upon the application for the temporary injunction. Simply put, the only showing made to the chancellor was that if an injunction did not issue, the district's schools would not open staffed by teachers on the date scheduled for such opening. We hold such showing insufficient to have justified the exercise of the plenary power of equity by the force of injunction.'" *School District for City of Holland, Ottawa and Allegan Counties* v. *Holland Education Association*, 380 Mich. 314, 157 N. W. 2d 206, 210 (1968).

This, then, is the scope of New Jersey's common law in this area. This boundless common law, operating as it does in the First Amendment area, is unconstitutional because of its imprecision and broad sweep.

In this posture the New Jersey Supreme Court stands alone, adopting an absolutist approach which has been completely rejected by the highest courts of both Michigan and California (see cases cited *supra*, n. 3). Other jurisdictions, while prohibiting public employee strikes to one degree or another, all refrain from using the awesome contempt power to *jail* peaceful rank and file strikers, which adds overkill to overbreadth. And, of course, many jurisdictions have taken the necessary initiative to develop realistic public employee labor policies. See Point III, *infra*.

We do not believe that the issue is that of "an absolute right to strike." See *Dorchey* v. *Kansas*, 272 U. S. 306 (1926); *International Union UAW-AFL* v. *Wisconsin Industrial Relations Board*, 336 U. S. 245 (1949). We know also that the broad formulations of *Thornhill* v. *Alabama*, *supra*, in the area of picketing have been the subject of much limitation by this Court. *International Brotherhood of Teamsters, Local 695, AFL* v. *Vogt, Inc.*, 354 U. S. 284 (1957).

But the fact that the rights of the employees are not absolute does not mean that the state has an unlimited right to bar activity in the First Amendment area freed of constitutional restraint.

Nowhere is the overbreadth of the New Jersey rule more clear than in the scope of support and communication activity which its courts prohibit in connection with public employee strikes. The *ex parte* restraint in the instant case not only forbade concerted action in furtherance of a strike by the teachers; it forbade any individual "acting in concert" with them from "directly or indirectly", "encouraging", "fostering", "sanctioning" or lending "support" to any "impediment to work" by any school employee. On its face and as applied, this injunction was designed to prevent both teachers and others interested in the teachers' grievances against the Newark school system from expressing publicly their feelings of support for and solidarity with the teachers' cause, since such expression would of necessity encourage and sanction the teachers' conduct of a strike. Thus when civil rights leader Bayard Rustin came to address a union rally in Newark on February 8 he was handed an order to showcause (Tr., Feb. 16, 1970, 30-33). Mr. Rustin was not tried, but less well known individuals, retired teacher

Alice Saltman and sympathizer Jerry Meyer, were prosecuted and convicted.

Probably not since the heyday of anti-labor injunctions in the 1920's and 30's has a court issued an injunction which so broadly prohibits conduct clearly within the area of the First Amendment.

How different is the rule in New Jersey from that in California, where the court in a case involving a strike of social workers acknowledged that it might be appropriate under given circumstances to enjoin strikes of public employees but that an injunction so issued had to be narrow so as not to prohibit, for example, "mere informational picketing and demonstrations designed to communicate the content of grievances and mobilize public support." *In re Berry*, 65 Cal. Rptr. 273, 283 (1968). Similarly, the court pointed out that an injunction could not be sustained which "forbids 'inducing others to participate' in demonstrations." As the court said,

> "Even if we assume, as we have done above, that all such activity would be properly enjoinable insofar as it advocated a strike by public employees, still a vast area of constitutionally protected activity falls within the wide reach of the ban." 65 Cal. Rptr. at 285.

In the recent opinion in *United Transportation Union* v. *Michigan*, 28 L. Ed. 2d 339 (April 5, 1971), the facial unconstitutionality of an injunction identical to that struck down by the Court in *Brotherhood of Railroad Trainmen* v. *Virginia State Bar, supra*, was detailed. Mr. Justice Black took pains to express the abuses to which the broad decree *could* be put. Nor could subsequent state administration of the injunction ameliorate the First Amendment impact.

> "Our statement in *NAACP* v. *Button* concerning the statute there in question is equally applicable to the injunction now before us: '[W]e cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights.' 371 U. S. at 438, 9 L. ed. 2d at 421." 28 L. ed. 2d at 344.

A plain reading of the injunction *sub judice* would prohibit, for example, one from "agreeing" (par. 7) to "parade . . . in the vicinity of . . . premises of the plaintiff" (par. 2), or "encouraging" (par. 2) another to so parade. A single person "parading" to the Board of Education administrative office (attached to the City Hall of Newark) would thus be subject to criminal penalty. The combinations and permutations of banned conduct are limitless and transcend the most basic forms of speech. How does one react when he is forbidden, under penalty of imprisonment, from "indirectly", "sanctioning" an "impediment to work" (par. 1)?

The matters of overbreadth and vagueness are not simply questions of language. The consequences—the threatened jailing of 186 persons, 97% of whom were never even named in the injunction—suggest the infirmities of overbreadth and vagueness transcending semantics; here we deal with functional overbreadth and functional vagueness. The extension of the punitive powers of an injunction to unnamed persons may well be appropriate in some circumstances where the prohibited conduct is precisely defined. No such precision exists here.

New Jersey in the same manner ignores in the procedural area firm principles of due process which this Court has insisted must be adhered to where First Amendment activity is affected. One hundred and eighty-six individ-

uals have been sentenced to jail for violation of an *ex parte* restraining order where no effort whatever was made to give them notice of the application and where 180 of them were not even named in the injunction. *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175 (1968), emphasized that:

> ". . . there is no place within the area of basic freedoms guaranteed by the First Amendment for such [*ex parte*] orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." 383 U. S. at 180.

Every word of the *Carroll* ruling is applicable to this case. Indeed, there was even more justification in *Carroll* for the failure to communicate in advance with the defendants since that involved a truly emergency situation of a rally scheduled a bare few hours off, following a tense situation created by a rally just the night before. The instant case involves an injunction issued some 36 hours in advance of a strike which had been threatened for some days before. Of course it is an *a fortiori* matter that, if named parties not given notice of the impending issuance of the court decree are beyond the court's jurisdiction, those unnamed must be unrestrained by that decree. See *Alemite Mfg. Corp.* v. *Staff,* 42 F. 832 (2d Cir., 1930) (Learned Hand, J.). See also *Zenith Corp.* v. *Hazeltine,* 395 U. S. 100 (1969).

Certain individual rights of public employees not involving concerted activity have already been squared with constitutional precepts. See, *e.g., Wieman* v. *Updegraff,* 344 U. S. 183 (1952) (loyalty oaths for state employees); *Slochower* v. *Board of Education,* 350 U. S. 551 (1956) (discharge from employment for invoking Fifth Amend-

ment); *Pickering* v. *Board of Education,* 391 U. S. 563 (1968) (school teacher's discharge for public criticism of school board's handling of bond issue); *United States* v. *Robel,* 389 U. S. 258 (1967) (threatened jail term for refusing to resign position in "defense facility"). It is now timely for similarly established constitutional rights to be applied to public employee concerted activity.

III.

The decisions below conflict with all studied efforts to resolve the complex social problems inherent in public employee unionism, and if allowed to stand will serve as precedent for the "easy answer", in total disregard of requirements of precision of regulation in this First Amendment area.

Reference has already been made to the significant context of this case. Now, with fully 15% of the total civilian labor force employed by federal, state and local governments,[10] the processes of government are straining for resolution of the competing claims of government for continuity of service and of public employees for the advantages of group activity. It may well be true that as concerns employees in the private sector "unionism . . .

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[10] Bruff, "Unconstitutional Conditions Upon Employment: New Departures in the Protection of First Amendment Rights," 21 Hastings L.J. 129, n. 1 (1970); Comment, "Constitutional Rights of Public Employees: Progress Toward Protection," 49 N. Car. L. Rev. 303, 304 (1971).

See also, U.S. Dept. of Labor Bureau of Labor Statistics, 1968 at 8, Table 41 (1968).

has apparently reached a plateau . . . in conceptualitation of underlying dispute settlement philosophies, procedures and legal structures." See Smith, *supra,* n. 2, 67 Mich. L. Rev. at 892. In the public sector that is anything but the case. For the 12 million public employees in this country, the meaning of the Constitution in respect to their freedom of association and their rights of expression has by no means been resolved, as this case so clearly demonstrates.

The problem is a pressing one because not only has there been a rapid increase in the proportion of the total work force employed by various levels of government, but also there has been a remarkable increase in the extent of organization amongst public employees. As one authority has recently pointed out, "ninety-nine per cent of American cities with a population over 250,000 have unions or employee associations representing public workers. . . . The fastest growing labor organization in the country is the American Federation of State, County, and Municipal Employees, AFL-CIO." See Kheel, "Strikes and Public Employment," 67 Mich. L. Rev. 931 (1969).

The range of proposals in this field runs from absolute strike bans, through limited bans, to absolute right to strike for public employees. See footnote 1, *supra.* Your petitioners do not expect the Court to become embroiled in the vast permutations and combinations which could make up sound labor policy throughout government. But New Jersey's absolutist position in contrast with the healthy recognition by many states and all the authorities of the need for careful and meticulous legislation necessarily brings into sharp focus the constitutional parameters governing developments in this area.

Illustrative of the substantive areas where testing is now proceeding in the many jurisdictions wrestling with these complex social problems is the federal government's recognition of a need for greater consideration of postal employee relations. The strike of 1970 made Congress recognize that if postal employees were to be barred from striking, an impasse procedure—in that case, binding arbitration—had to be provided "so as to assure parity of bargaining power between labor and management." Kappel Commission in Postal Reorganization, U. S. Code Congressional and Administrative News, 1970, pp. 3662-63. See 39 U. S. C. §1207.[11] Other jurisdictions are at work differentiating between and among their public servants as to essentiality of function.[12] Several jurisdictions specifically permit public employee strikes, but provide for emergency foreclosure of work stoppages upon a showing of extreme impact on health or welfare.[13] Finally, the matter of penalty for strikers

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[11] For other arbitration provisions, see, e.g., Statutes of Canada 1966-67, Chap. 72 — Public Service Staff Relations Act §§ 63, 72; Maine Rev. Stat. 26 §965 (1970 Supp.) (issues limited); Mich. Stat. Ann. 317.455 (31)-(47) (police and firemen at option of either party); Purdon's Pa. Stat. mental institutions, and employees of the courts, §217.4 (police and firemen); Gen. Laws of R.I. 28-9.1-7 (1970 Supp.) (firefighters) §28-9.2-7 (police) §28-9.3-1 and §28.9-4-1 (teachers and other municipal employees, at option of either party; Utah Code Ann. §11-20-32 (1969 Supp.) (binding arbitration in all matters); Wyoming Stat. §27-269 (firefighters).

[12] Gen. Laws of R.I. 28-9.1 *et seq.* (1970 Supp.); Purdon's Pa. Stat. Ann., Title 43 §1101.1001 (1971 Supp.); Vt. Stat. Ann., Title 21 §1706 (1970 Supp.)

[13] 1970 Session Laws of Hawaii, Act 171 §12; Purdon's Pa. Stat. Ann., Title 43 §1101.1003 (1970 Supp.) (limited); Vt. Stat.

(Footnote continued on following page)

(and/or the union as an institution) is receiving considerable attention.[14]

The jailhouse, as the remedy for peaceful group action, is not employed except in New Jersey.

Thus, experimentation is proceeding in many areas—except New Jersey. The New Jersey position, as previously outlined (1) absolutely bans the strike for any and all public employees, (2) provides no effective post-impasse procedure for resolving differences short of economic warfare, and (3) imprisons peaceful rank and file strikers. New Jersey, uniquely, relies on the common law and mass jailing instead of exercise of "legislative judgment." See *Ashton* v. *Kentucky,* 384 U. S. 195

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Ann., Title 21 §1704 (1970 Supp.) (firefighters excluded). *Cf.,* 29 U.S.C. §§176-179, Labor Management Relations Act (national emergency), and interpretation in *United Steelworkers of America* v. *United States,* 361 U.S. 39 (1959).

It is interesting to note that the New Jersey Commission (reporting Jan. 1968) studying these matters recognized "that both public sentiment and judicial opinion may alter over time" as to the right to strike. Smith, *supra,* n. 2, at 909.

[14] Mich. Comp. Laws Ann. §423.206 (1967) (only remedial action against individual striker is discharge); N.Y. Civ. Serv. Law §210 (Amended 1969) 2(f) (one-year probation and restriction on tenure for individual striker) 2(a) (fine of two days' pay for each day individual strikes) 3(f) (loss of benefit of checkoff to union as an institution) (see also Judiciary Law §751, 2(a) (1967) (fine only penalty for union in contempt)); Exec. Order 10,988 (3 CFR 521 (1959-63 compilation)) (union of federal employees loss of representation status); Vt. Stat. Ann., Title 21 §1706 (1970 Supp.) (striking firefighters discharged and barred from future public employment).

(1966); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). It is thus incumbent upon the Court to focus on the New Jersey position, for if it is allowed to stand, incentive to take on the difficult task of accommodating First Amendment rights with public employee concerted activity will be undermined.

IV.

The New Jersey Court's misapplication of *Walker* v. *City of Birmingham* in the critical area of First Amendment rights requires review.

In its opinion sustaining the conviction of the defendant Joan Stevens, the Appellate Division stated that "constitutional attack [against the injunction] is not available to defendant in these collateral contempt proceedings," citing *Walker* v. *City of Birmingham,* 388 U. S. 307, 317 (1967) (cited in *Joan Stevens* unreported *per curiam* opinion, 16a). The lower court has seriously misread *Walker* and has thereby denied fundamental constitutional rights.

There are several reasons why this case differs from *Walker.* However, one major difference—if not examined and excluded by this Court from the *Walker* doctrine—could bring about a substantial change in injunctive processes throughout the nation which, when applied in First Amendment areas as in this case, has calamitous effect. *Walker* holds that issues as to the validity under the federal Constitution of a state court injunction may not be raised as a defense to a contempt proceeding where no action was taken to contest the injunction. That is an understandable rule to apply, as in *Walker,* to persons who are parties to the injunction proceeding. But

how can it possibly apply to a person not a party to the injunction proceeding? He is in no position to litigate constitutional issues arising from the injunction until he is confronted with the contempt proceeding. To bar opportunity to do so then on the theory that he should have come forward previously, when he was not even a party, is a plain denial of due process of law. (A corollary to this proposition is the impropriety of analogizing *United States* v. *United Mine Workers,* 330 U. S. 258 (1947), to the case *sub judice.* Though the law may bind and enjoin named parties pending a determination by the court of its jurisdiction, it may not so bind unnamed parties. Of course, the *Mine Workers* case only involved the union president and the national union, who were named parties. Compare *In re Green,* 369 U. S. 689 (1962).)

The change in injunctive process inherent in applying the *Walker* stricture to unnamed persons will undoubtedly have broad impact on First Amendment rights, and thus should be reviewed by the Court prior to haphazard implementation by subordinate courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the New Jersey Superior Court, Appellate Division.

Respectfully submitted,

MORTON STAVIS
PAUL J. GIBLIN
Counsel for Petitioners

On the Petition:

MORTON STAVIS
MORRIS STERN

APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

THE BOARD OF EDUCATION OF NEWARK IN THE COUNTY OF ESSEX, a corporation, etc.,

Plaintiff-Respondent,

vs.

NEWARK TEACHERS UNION, LOCAL NO. 481, AMERICAN FEDERATION OF TEACHERS, A.F.L.-C.I.O., etc., *et al.*,

Defendants.

In the Matter of

NEWARK TEACHERS UNION, LOCAL 481, AMERICAN FEDERATION OF TEACHERS, AF.L.-C.I.O., etc., and One Hundred Eighty Five (185) others,

Appellants.

The opinion of the court was delivered by CONFORD, P.J.A.D.

This is an appeal by the defendant union and 185 individual defendants from summary adjudications of contempt of court and sentences pursuant thereto for violation of a January 31, 1970 order of the Chancery Division restraining defendants from engaging in a strike against

the Newark Board of Education. The issues projected on the appeal are narrow. Prohibited picketing by most of the defendants is in effect conceded in the single brief filed on behalf of all defendants.

A quotation from defendants' brief well sets the background against which the issues before us must be considered:

> "On the following day (February 1) at a meeting sponsored by the Newark Teachers Union, held at the Military Park Hotel in Newark, attended by 2,000 or more people, covered by all major television and radio networks and newspapers in the New York metropolitan area, a strike was called. On the following day, Monday, more than 3,000 of the approximately 4,000 school teachers of the Newark school system did not report to their classrooms. That situation with some up and down fluctuations remained fairly constant throughout the four weeks of the strike."

The foregoing may be supplemented by the fact that at the February 1 (Sunday) union mass meeting the president of the union, Carol Graves, told the audience that the union had been served with the restraining order but that it would strike anyway as the only means of redress of its grievances.

The restraining order was broad and comprehensive. It was directed against the union, the New Jersey State Federation of Teachers, "their respective members, officers, directors, committee members, employees, agents and representatives," [there followed the names of 11 individuals] "and all persons acting in behalf of or in con-

cert or participation with the said defendants or the said members, officers," etc. Among the acts that were prohibited were:

> "1. Causing, instigating, promoting, sanctioning, authorizing, carrying on, participating in, fostering, continuing, lending support or assistance to or aiding or abetting any strike, sitdown, slowdown, work stoppage or other impediment to work, against the plaintiff or by any employee or employees of the plaintiff;
>
> 2. Picketing, congregating, parading, patrolling, loitering, gathering, or walking back and forth,—or causing, instigating, promoting, encouraging, sanctioning, intimidating, coercing, counselling or authorizing any person or persons to picket, congregate, parade, patrol, loiter or walk back and forth,—in front or in the vicinity of the public schools, buildings, grounds, playgrounds, yards, or premises of the plaintiff or operated or administered by the plaintiff, or in front of any buildings, grounds, playgrounds and premises on or at which any instructional or guidance program is conducted by plaintiff;
>
> 3. Interfering with, obstructing, impeding, or delaying, or attempting to interfere with, obstruct, impede or delay the plaintiff in the performance of any of its duties and functions or in the conduct of the Newark public school program; . . .
>
> 7. Agreeing, conspiring, or combining to do any of the foregoing acts, or directly or indirectly accepting, arranging for, or soliciting from any source

funds or other support for the doing of any of the foregoing acts mentioned in paragraphs '1' to '6', directly preceding the within paragraph '7'."

While the order was to expire February 13, 1970 it was continued and ultimately made permanent.

Most if not all the individual defendants were arrested for violations of the restraint, generally when found picketing or assembling and congregating outside the schools on what normally would have been regular school days when the teacher-defendants would normally be expected to be working inside the buildings. Six officers of the union were arrested pursuant to arrest orders expressly naming them. Almost all the other individual appellants were arrested pursuant to a general arrest order issued by the Chancery Division not naming specific persons but directing the arrest by the Sheriff of "any individual who in his presence or that of any member of his staff is observed to continue to violate this court's order of January 31, 1970".

I.

Th first appellate point urged is that the general order of arre ' was illegal and the State may not rely upon the "fr··its" of the illegal seizures pursuant thereto – *i.e.*, the identification of the picketing defendants. Even if the premise were conceded the conclusion derived therefrom would not follow.

Even if the general order be invalid for failure to name or identify particular persons to be arrested, *cf. West* v. *Cabell*, 153 U. S. 78, 85-6 (1894); Fisher, *Laws of Arrest* 107 (1967), we do not find the arrests invalid.

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An arrest not supportable under a warrant therefor will not be held invalid if there is another basis upon which to sustain it. *Cf. State* v. *Masco,* 103 N. J. Super. 277, 282 (App. Div. 1968). Here there is.

The common law made a distinction between felonies and misdemeanors for purposes of distinguishing the criteria for authorization of an arrest by a peace officer without a warrant. In the case of the former the test was probable cause to believe the arrestee had committed or was committing the offense; in the latter, whether the offense was being committed in the officer's presence. *State* v. *Smith,* 37 N. J. 481, 494-495 (1962), *cert. den.* 374 U. S. 835 (1963). In *State* v. *Doyle,* 42 N. J. 334 (1964), the dichotomy between "felonies" and "misdemeanors" for the foregoing purposes was transmuted into one between offenses punishable by incarceration in state prison for more than one year and those not so punishable (*Id*, at 349). In the present case, since the alleged offenses by defendants were specified by the court's order to be prosecuted summarily by the court without initial indictment by grand jury and trial by jury the maximum potential incarceration for guilt became limited to six months. *In Re Ruth M. Buehrer et al.,* 50 N. J. 501 (1967). Consequently, applying the criterion of *Doyle, supra,* these alleged offenses fell into the category wherein the peace officers could arrest only if the offenses were committed in the presence of the officers. It is our conclusion that they did.

The term "presence" sums up the requirement that the officers knew of the criminal event by the use of their senses. *State* v. *Smith, supra* (37 N. J., at 495). The criminal event in the present case would be any objec-

tive conduct by an individual which an officer could fairly conclude was violative of the restraining order. Picketing, with or without the carrying of signs, would obviously be such. The order also contains prohibitory language broadly referable to the ordinary common-law concept of aiding and abetting. Individuals assembling or milling about in groups outside schools or school administration buildings, inferably to deter teachers or other school personnel from attending to their duties or to encourage others to continue with their participation in the union endeavor to carry on the strike, can fairly be said to be aiding and abetting the violation of the restraining order by others as well as directly violating it themselves. We therefore conclude the offenses by those defendants who were arrested were being committed in the presence of the arresting officers and that the arrests were consequently valid.

This makes it unnecessary for us to consider what seems to us at least a dubious proposition—that if the arrests were illegal the convictions were achieved with the aid of the illegal "fruits" thereof in the form of "identification" of the wrongdoers.

II.

Defendants contend that they were convicted of contempt of court because of absence from the classroom although they were never charged with that act.

We do not find that any defendant was convicted of contempt for absence from the classroom *per se* as an act of disobedience of the restraining order. It is evident from the totality of the findings in each case that evidence of absence from the classroom by teacher de-

fendants, coupled with proof that the absentee had failed to comply with a school regulation requiring explaining absences to the principal of the school, and in the light of all the other evidence in the case, was taken as a sufficient showing to justify the ultimate determinative finding that the particular absent defendant was participating, directly or indirectly, in the strike, contrary to the restraining order.

That the several trial judges entertained this conception is illustrated by Judge Mintz' comment at the outset of the Kirschbaum hearing: "* * * we'll proceed on the theory that the Order to Show Cause charges this defendant with unlawful picketing in front of the Lafayette Street School on February 19, 1970 and unlawful absence from his classroom *as part of a strike movement on the part of Local Union 481*" (emphasis added).

Again, "Now, the contention of the State is that this defendant by absenting himself unlawfully or without justifiable reason from the classroom *aided and abetted in a strike*". (Emphasis added.)

Thus it was the ultimate determination, expressly or impliedly, of participation in the strike which underlay each adjudication of contempt.

The vast majority of the individual defendants were proven to have been picketing, and as to these there can be no question that the adjudications of contempt were unexceptionable. Defendants' brief names eight defendants who assertedly were not proven involved in picketing but were convicted solely on the allegedly uncharged offense of absence from school. Those so named are defendants Raymond Kirschbaum, Fred Klock, Dorothy

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Bergman, Ellen Asselmeyer, James Peluso, Marilyn Lago, Marie Mirabella and Alan Yablonsky. The specific evidence and findings as to these were as follows:

Kirschbaum. On February 19 he was loitering as one of a group of three persons across the street from Lafayette School whereas his place of employment as a teacher was East Side High School. He was found not to have been "picketing" as such "in front of" Lafayette School. He was found to have absented himself from classes without cause or notice.

Klock. He was observed on February 19 driving a car in front of the Summer Avenue School and waving his left arm out the car window. He was then seen to stop his car in front of the school and blow the car horn while continuing to wave his arm. A number of persons, including several of the other defendants who had been walking in front of the school, moved out of their line upon hearing Klock. Klock was then arrested. There was also evidence that Klock was assigned to Barringer High School, and was absent without notice from February 2 to 25, 1970. On the basis of this evidence a trial judge found that Klock was probably "the lookout for picketers at or near Summer Avenue School"; he interpreted the evidence against Klock as indicating that the defendant "would blow his [car] horn and wave his hand to direct picketers to leave when the official car was arriving in the area."

Bergman. Several officers and detectives saw her at the Summer Avenue School on February 19 wearing a sign referring to the teachers' union and standing near an automobile occupied by two other persons. There was also evidence that she had been absent from the Boylan

Street School without notice from February 2 to 25. A trial judge found that she had been "present with a picket sign near the Summer Avenue School after some of her colleagues had been arrested" in addition to having participated in the strike with knowledge of the restraining order.

Asselmeyer and Peluso. These defendants were the two persons in the car next to which defendant Bergman was arrested The evidence against them was that a sign referring to the strike was seen in the car which they occupied, and upon the arrest of Miss Bergman the car drove away from the Summer Avenue School. A detective gave chase in his vehicle and apprehended Peluso and Asselmeyer several blocks from the school. There was also evidence that Peluso was absent without explanation from his assigned duties at Abington Avenue School from February 2 to 25, and that Asselmeyer was absent throughout the same period from the Boylan Street School. The trial judge found that these two defendants

> "were observed on February 19, 1970 in the area of Summer Avenue School. Mrs. Asselmeyer was wearing a picket sign, and Mr. Peluso accompanied her in an automobile in which the picket sign was located. From this it can be inferred that they had picketed in the area of Summer Avenue School, but, in any event, they were out of school despite knowledge of the restraining order, and by staying out in concerted fashion with their colleagues until February 26, as a result of the strike call on February 1 at the union meeting, they were thereby, also guilty of violating the order."

Appendix A

The trial judge found that an inference of picketing by these defendants were permissible and that they had concertedly violated the restraint.

Lago, Mirabella and Yablonsky. There was evidence that they were seen standing in front of Immaculate Heart of Mary Church, across the street from the Lafayette Street School, on February 19. There were no pickets immediately in front of that school. As a vehicle bearing Eessex County Sheriff's markings approached the school, the three named defendants ran into the church; after the marked vehicle left the area of the school and church the defendants returned to the sidewalk in front of the church. They were subsequently arrested. There was also evidence that Yablonsky was absent from his South Street School duties from February 2 to 25 without notice to the principal, and that Marilyn Lago and Maria Mirabella were inexcusably absent from their duties at the Oliver Street School during that same period, although Marilyn Lago did call in sick from February 19 to 25. The trial judge found that the evidence sustained the charge that these defendants were picketing, congregating, parading, etc. "in the vicinity" of a Newark public school.

We conclude that all the defendants, including those specifically mentioned above, were properly found guilty of contempt of court in that the proofs justified beyond a reasonable doubt findings that they violated the restraining order by willfully participating in or aiding and abetting the strike in one or more of the ways prohibited by the restraining order.

Pursuant to our appellate responsibility under N.J.S.A. 2A:10-3 and R. 2:10-4; *Sarner* v. *Sarner,* 28 N. J. 519,

525 (1959), app. dism. 359 U. S. 533 (1959), reh. den. 360 U. S. 940 (1959); *State* v. *Gussman,* 34 N. J. Super. 408 (App. Div. 1955); and *Zimmerman* v. *Zimmerman,* 12 N. J. Super. 61, 69 (App. Div. 1950), we have reviewed the evidence in all the cases *de novo* on the record and concur in the findings below of guilt of each of the defendants of contempt of court beyond a reasonable doubt.

III.

Defendants contend they were improperly convicted of contempt in that they were afforded no or inadequate notice of the offense or offenses they were charged with. We do not agree.

Specifically, defendants contend the requirements of R. 1:10-2, governing summary contempt proceedings, were not observed by the State. The rule requires the court to institute the proceedings by order for arrest or order to show cause "specifying the acts or omissions alleged to have been contumacious". The arrest order of February 10 recited sworn allegations that "illegal picketing has been and is being conducted on a well-organized plan". The complaints filed against particular defendants charged assembling with others and picketing at named locations. Each defendant was later served with an "order continuing arrest" charging them, knowing of the existence and content of the restraining order of January 31, with (a) carrying on and participating in a strike against the board of education; (b) picketing, congregating and assembling at a specific location in front of a school or board of education building; and (c) obstructing and impeding the board of education in conducting its functions and programs.

We are satisfied that the foregoing, in totality, adequately apprised the defendants of the charges on which they would be tried and met the spirit and intent of R. 1:10-2 as well as defendants' rights to due process.

IV.

Defendants contend that the sentences imposed were "arbitrary and excessive". The sentences imposed were, for the most part, of ten days in jail and $200 fines. Up to three months in jail and $500 fines were imposed upon union leaders. The union was fined $40,000. The argument is that the sentencing motivations were "subjective" whereas they should have been exclusively based on the "objective" facts; that the defendants were being punished essentially for striking rather than for violating the restraint.

The assertions are not soundly conceived. Sentences were in all cases based upon the violation of the restraint although the effect of the contempt on the public interest was undoubtedly in the minds of the sentencing judges, having been expressly mentioned in some instances. Defendants' apparent argument—that the nature and effect of the conduct restrained by the order contemned is irrelevant to appropriate punishment for the contempt—is ill founded. Were it accepted, all criminal contempts of court would be punished relatively uniformly, all being theoretically merely the affront to the dignity of the court. The law is otherwise. The public interest in the subject matter of the restraint is a highly relevant factor in assessing punishment for the contempt. *In Re Ruth M. Buehrer et al., supra* (50 N. J. at 507, 508). There is no more important public interest than the freedom from

interruption in, or the disruption of, the ducation of school children. See *N. J. Const.*, Art. VIII, § IV, par. 1.

It is our duty as an appellate court in summary contempt cases to adjudge punishment as well as guilt. N.J. S.A. 2A:10-3; R. 2:10-4; *Sarner* v. *Sarner, supra; Zimmerman* v. *Zimmerman, supra.* We have hereinabove adjudicated guilt of all defendants. After assaying the whole record and considering the appellate arguments we concur in the sentences severally imposed on each of the defendants by the respective trial courts which are herewith incorporated by reference into this determination. All pending stays are vacated. Fines are to be paid forthwith if not already paid. Jail terms shall be served commencing July 12, 1971.

So ordered.

APPENDIX B

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

In the Matter of

JOAN STEVENS

Charged with Contempt of Court

PER CURIAM

Defendant Stevens, a teacher in the Newark School system, appeals from the judgment finding her guilty of contempt of court because, on February 18, 1970, she had engaged in picketing at the Avon Avenue school in violation of the provisions of an order, originally entered in the Chancery Division on January 31, 1970, prohibiting a strike against the Newark Board of Education. She was sentenced to 10 days in the County Penitentiary and fined $200.

The circumstances of the strike and the details of the restraining order are set forth in our opinion filed this day in *"Board of Education of Newark, etc.* v. *Newark Teachers Union, etc. et al"* . . . *"In the Matter of Newark Teachers Union Local 481 etc. and 18 others"* (the Board of Education case) and need not be repeated here.

Miss Stevens was one of a number of persons brought to trial before Judge Allcorn on March 16, 1970 and found guilty of contempt of court for violating the re-

straining order. The appeals of those defendants other than Miss Stevens are included among the appeals in the "Board of Education case"; Miss Stevens has filed a separate appeal through separate counsel.

Five points are argued for reversal. We find no merit in any of them.

It is undisputed that at about 8 A.M. on February 18, 1970 sheriff's officers found a group of ten people, one of whom was Miss Stevens, walking in a circle or back and forth in front of the Avon Avenue school. Some carried signs reading, among other things, "no contract, no work," "better schools," "teachers want what children need." The officers were unable to recall whether Miss Stevens was carrying a sign. All ten were arrested and charged with contempt of court.

Defendant's first two points may be considered together. She contends that "the evidence does not support a finding of guilty beyond .. reasonable doubt" because it fails to show that she had actual knowledge or notice of the restraints. Noting that there was no evidence that she "was informed directly of the restraining order or its terms," defendant argues that the proofs do not support the finding that she knew of the restraints which she was charged with violating.

We conclude from our examination of the record that the proofs support the trial court's finding; indeed that they dictate the same finding by us in the exercise of our appellate responsibility to determine guilt under N.J. S.A. 2A:10-3 and R. 2:10-4.

It is evident that Miss Stevens engaged in the picketing in furtherance of the strike and its objectives. The

strike had begun on February 2 and Miss Stevens stayed out of school from that day until February 25, 1970. Publicity with respect to the strike, the restraints issued against it and the numerous previous arrests made for violations of those restraints was intense and widespread. Notice of the injunction was posted on school bulletin boards.

The inescapable inference from the proofs is that defendant was fully aware of the restraints and deliberately violated them when, on February 18, 1970—17 days after the strike started and her absence from school began—she joined fellow teachers in picketing at the Avon Avenue school.

There is no substance in defendant's contention "that the Restraining Order is so vague and ambiguous on its face as to fail to give reasonable notice."

Nor is there any merit in the claim that the restraining order was too broad and violated defendant's constitutional rights of free speech and assembly. *Bd. of Education, Borough of Union Beach* v. *N.J.E.A. et al.*, 53 N. J. 29, 40-43 (1968). A restraint against an unlawful strike and picketing in furtherance thereof was constitutionally permissible. The order gave sufficient notice of what was prohibited to satisfy the requirements of due process.

Further, the constitutional attack is not available to defendant in these collateral contempt proceedings. *Walker* v. *City of Birmingham*, 388 U. S. 307, 317, 87 S. Ct. 1824, 1830 (1967).

We find no validity in the contentions that the procedural requirements of R. 1:10 were not complied with

and that defendant's arrest without a warrant was not authorized.

We concur in the findings of the trial court that defendant has been proven guilty of contempt of court beyond a reasonable doubt. Further we are satisfied that the sentence imposed by the trial court was warranted and concur therewith.

The fine of $200 is to be paid forthwith if it has not already been paid. The sentence of ten days in the County Penitentiary is to be served commencing July 12, 1971.

So ordered.

APPENDIX C

Order of the Supreme Court of New Jersey Denying Certification

(Filed—July 7, 1971)

SUPREME COURT OF NEW JERSEY

C-547 SEPTEMBER TERM 1970

THE BOARD OF EDUCATION OF NEWARK, etc.,

Plaintiff-Respondent,

vs.

NEWARK TEACHERS UNION, etc., *et al.*,

Defendants-Petitioners.

On Petition for Certification

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of July, 1971.

IRVING B. ZERCHNER
Acting Clerk of the Supreme Court

Appendix C

Order of Supreme Court of New Jersey Dismissing Appeal

(Filed—July 7, 1971.)

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM 1970

THE BOARD OF EDUCATION OF NEWARK, etc.,

Plaintiff-Respondent,

vs.

NEWARK TEACHERS UNION, etc., *et al.*,

Defendants-Petitioners.

This matter having been duly presented to the Court, it is Ordered that the appeal is dismissed pursuant to Rule 2:12-9.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 7th day of July, 1971.

IRVING B. ZECKNER,
Acting Clerk

Appendix C

Order of Supreme Court of New Jersey Granting Stay

(Filed—July 7, 1971.)

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM 1970

THE BOARD OF EDUCATION OF NEWARK, etc.,

Plaintiff-Respondent,

vs.

NEWARK TEACHERS UNION, etc., *et al.*,

Defendants-Petitioners.

This matter having been duly presented to the Court, it is Ordered that the motion for stay is granted to July 22, 1971 to permit application for stay to the U. S. Supreme Court on notice to the County Prosecutor. All sentences to commence on August 2, 1971 if no stay is granted by the U. S. Supreme Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of July, 1971.

IRVING B. ZECKNER,
Acting Clerk of the
Supreme Court

APPENDIX D

Order of Honorable William J. Brennan, Jr.

SUPREME COURT OF THE UNITED STATES

No. A-54, OCTOBER TERM, 1971

NEWARK TEACHERS UNION, etc., *et al.*,

Petitioners,

vs.

THE BOARD OF EDUCATION OF NEWARK, etc.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners and the response of counsel for the respondent in opposition thereto,

IT IS ORDERED that the execution of the judgment and mandate of the Superior Court of New Jersey, Appellate Division, in the above-entitled cause be, and it is hereby, stayed, pending the filing of a petition for a writ of certiorari on or before August 15, 1971. Should such a petition be so timely filed, this stay is to continue pending this Court's action on the petition. If the petition for a writ of certiorari is denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to remain in effect pending the issuance of the mandate of this Court.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States.

Dated this 23 day of July, 1971.